

# Section 7 – Endangered Species Act

and

# Waterways Permitting

## Section 7 Consultation

## Endangered Species Act of 1973

- Section 7 of the Act
- What does it do? – Provides guidance on consultations and conferences
- With Who? – U.S. Fish and Wildlife Services (USFWS) and the National Marine Fisheries Service (NMFS)

## Activities

- Under provisions of Section 7 (a) (2) of the Endangered Species Act (ESA), a federal agency that permits, licenses, funds, or otherwise authorizes activities must consult with USFWS
- Why? – To insure that its actions will not jeopardize the continued existence of any listed species.

## Informal Consultation

- Informal consultation is an optional process that is designed to help the applicant and the Action Agency determine if formal consultation is needed – **No specific timeframe!**
- Federal agencies and designated non-federal applicant may use this period to work with the Service on project design and conservation actions that would remove all adverse effects and alleviate the need for formal consultation.

## Formal Consultation

- Formal consultation is a mandatory process for proposed projects that may adversely affect listed species. It is initiated in writing by the Federal agency, and concludes with the return of a Biological Opinion by the Services.
- The Services strongly encourages the use of informal consultation so that projects can be designed with minimum impacts to a listed species, so as to possibly result in a determination of no adverse effect, and thus eliminate the need for formal consultation.

## Steps to Follow

- Federal Agency contacts local Service office to determine if listed species are present in the Action Area (**Early Coordination**)
- The Service responds to request by providing a list of species that are known to occur or may occur in the vicinity (**Species for consideration**)
- If negative response – no further consultation

## If Listed Species are Present (But "Not Likely to Adversely Affect")

- Federal Agency must make a "**May Affect**" Determination
  - a. Not likely to adversely affect
  - b. Likely to adversely affect
- If beneficial, insignificant, or discountable and the Service agrees, the Service provides concurrence in writing and no further consultation is needed



## If “Likely to Adversely Affect”

- If the Federal Agency makes the determination of “likely to adversely affect”, they must initiate formal consultation by submitting an initiation package or Biological Assessment
- Up to this point, there has been informal consultation with the Service

## Formal Consultation

- Once the Service receives the Biological Assessment, formal consultation begins
- The Service has 90 days to consult with agency (may be extended), and 45 days to prepare a Biological Opinion (BO)
- A BO is submitted to the Federal Agency with 135 days of initiating formal consultation.

## Potential Outcomes of a Biological Opinion

- A Biological Opinion is the document that states the opinion of the Service as to whether or not the Federal Action is like to **jeopardize** the continued existence of listed species or result in the destruction or adverse modification of **critical habitat**.

## Critical Habitat

- Critical habitat is a specific geographic area(s) that is (are) essential for the conservation of a threatened or endangered species and that may require special management and protection (Example – Certain caves or hibernacula for the Indiana bat)

## Section 7 Responsibilities for Species Proposed for Listing

- Section 7 (a) (4) requires Federal agencies to confer with the Services on any agency action which is likely to jeopardize the continued existence of any species proposed for listing or result in the adverse modification of critical habitat proposed to be designated

Does a Federal Agency need to consult with Services on “No Effect, “Beneficial Effect” or “Not likely to Adversely Affect”

- A Federal Agency is not required to consult with Services if it determines an action will not affect listed species or critical habitat.
- A Federal Agency is required to consult if an action “may affect” listed species or designated critical habitat, even if the effects are expected to be beneficial.



## Timing of Formal Consultation

- Biological Assessment may be completed prior to the release of the DEIS or the EA
- Formal Consultation should be initiated prior to or at the time of release of the DEIS or EA
- At the time the Final EIS is issued, Section 7 Consultation should be completed
- The ROD for an EIS should address the results of Section 7 Consultation

## Can Formal Consultation be Stopped Once Started?

- Yes!
- The Action (Federal) Agency can withdraw its request for formal consultation by submitting a letter describing why the action is no longer being considered by the agency



Does an agency have to get a permit under Section 10 if the agency's action involves Intentional Take (e.g., handling, banding birds) as well as Incidental Take?

- Generally, if the take is an intentional take, then a separate permit is required.

## Waterways Permitting 101

## Permitting Laws and Decisions

- NEPA
- Clean Water Act
- Rivers and Harbors Act of 1899
- EO 11990
- SWANCC Decision
- Food Security Act
- Endangered Species Act



## Environmental Permitting Agencies - federal

- U.S. Army Corps of Engineers
  - Section 404
  - Section 10
  - Levee Permit
- U.S. Coast Guard
  - Section 9
- U. S. Environmental Protection Agency
  - Section 404 Class V Injection Wells
  - Sole Source Aquifer

## Environmental Permitting Agencies - state

- Indiana Department of Environmental Management
  - 401 Water Quality Certification
  - Rule 5
  - Isolated Wetlands

## Environmental Permitting Agencies – state, Cont'd.

- Indiana Department of Natural Resources
  - Construction in a Floodway
  - Navigable Waterways
  - Dewatering Well Installation
  - Water Well Abandonment
  - Lakes Preservation Act
  - Lowering of Ten Acre Lakes Act



## Environmental Permitting Agencies - County

- Regulated Drain Permit



## Aquatic Resources Subject to Waterway Permits

- Discharge of dredged/fill material - Under Clean Water Act – Mechanism that establishes USACE jurisdictional authority
  - The addition of dredged/fill material into waters of the United States (i.e., within the jurisdictional area(s))
    - Connected or adjacent to tributaries of navigable waters of the U.S.
    - Fill material has the effect of or used for the primary purpose of:
      - replacing an aquatic area with dry land or;
      - of changing the bottom elevation of a waterbody.
- Waters of the United States
  - Streams
    - Perennial
    - Ephemeral
    - Intermittent

## Aquatic Resources Subject to Waterway Permits, Cont'd.

- Wetlands
  - Wetlands subject to jurisdiction by USACE or IDEM
  - Wetlands subject to jurisdiction by NRCS
    - Prior converted cropland (PC)
    - Wetland (W)
    - Farmed Wetland (FW)
    - Converted Wetland (CW)
    - Artificial Wetland (AW)

## Aquatic Resources Subject to Waterway Permits, Cont'd.

- Other Aquatic Resources
  - Roadside ditches
    - Channelized or captured stream
    - Wetland
    - Other waters

## Prerequisites for Permit Application

- USACE Jurisdictional determination vs. Isolated Wetland determination
- Ecological Coordination - including Section 7
- Cultural Resources

## Types of Waterway Permits

- USACE 404 Permits
  - Regional General Permit (RGP)
  - Nationwide Permit (NWP)
  - Individual Permit (IP)



## U.S. Army Corps of Engineers – Regional General Permit (RGP)

### Maximum Limitations

- Discharges of dredged/fill material limited to one (1) acre or less of Waters of US, including wetlands
- Dredging in navigable waters is limited to 10,000 cubic yards
- Structures/fills for docking/mooring limited to similar permitted structures/fills in the vicinity
- Discharges of dredged/fill material into Lake Michigan limited to 0.10 acre except for bank stabilization

## U.S. Army Corps of Engineers – Section 404 Nationwide Permit (NWP)

- IDEM has denied Section 401 WQC for certain NWPs, or applied condition to certain NWPs, thereby subjecting these activities to Section 401 review.
- Many activities formally authorized by NWPs are now authorized under RGPs
- It is INDOT policy to submit a RPG application form for all project that appear to qualify for a RPG.

## U.S. Army Corps of Engineers – Section 404 Nationwide Permit (NWP) – Application Process

- USACE will occasionally issue a NWP in Indiana, but only under its discretion, in lieu of a RGP.
- The application should not propose an application specifically for a NWP.
- Use the same application process/forms as for RGP

## U.S. Army Corps of Engineers – Section 404 Nationwide Permit (NWP) – Permit Review/Approval

- Should USACE determine project qualifies for a NWP, then they will indicate what additional information, if any, should be sent.
- If USACE elects to authorize a project under a NWP, an official letter is sent stating under which NWP(s) it has authorized the project.

## U.S. Army Corps of Engineers – Section 404 Nationwide Permit (NWP) – Permit Review/Approval

- Typically NWPs are valid for two years. Any NWPO with a specific expiration date must be completed by the expiration date stated in authorization letter.
- However, if expiration date not specifically stated in authorization letter, the NWP may be valid until March 19, 2007 (expiration date of current NWPs). As long as work has started prior to expiration date, work is authorized. However this work must be completed by March 19, 2008.
- Applicant must submit request for time extension if activity will not be complete within specified time frame.

## U.S. Army Corps of Engineers – Section 404 Individual Permit (IP)

- Required for all projects that do not qualify for a RGP or a NWP
- Authorize projects that have more than minimal adverse effect on aquatic environment.
- $\geq 1$  acre jurisdictional wetlands/Waters of US impacted



## Section 10 of Rivers and Harbors Act of 1899

- Section 10 activities for work in or over Navigable Waters of U.S. (see Appendix E for listing of Navigable waters of U.S.) include construction of piers, wharves, bulkheads, marinas, ramps, float intake structures, cable or pipeline crossings and dredging and/or excavation

## USACE Levee Permit

- For work affecting legal levees within jurisdiction of local levee authority (e.g. Evansville Levee Authority).
- Send permit application (obtained from local levee authority) plus a set of plans/specifications to levee authority
- After levee authority approves project plans, they forward it to USACE.
- A formal approval document is then received from local levee authority and USACE

## U.S. Coast Guard Section 9 Bridge Permit

- Required to construct new bridge/causeway /modify existing bridge/causeway across commercially navigable waters of U.S. (see Appendix O).
- Submit NEPA document/401 WQC/404 Permit with application for Section 9 Permit
- Once application has been received by Coast Guard, they will publish public notice. No permit will be issued until public notice process completed.

## EPA Class V Injection Wells

- Class V Injection Wells are generally shallow subsurface fluid disposal systems which are disposing of non-hazardous fluids into or above underground sources of drinking water (see Appendix G-7).

## EPA Class V Injection Wells

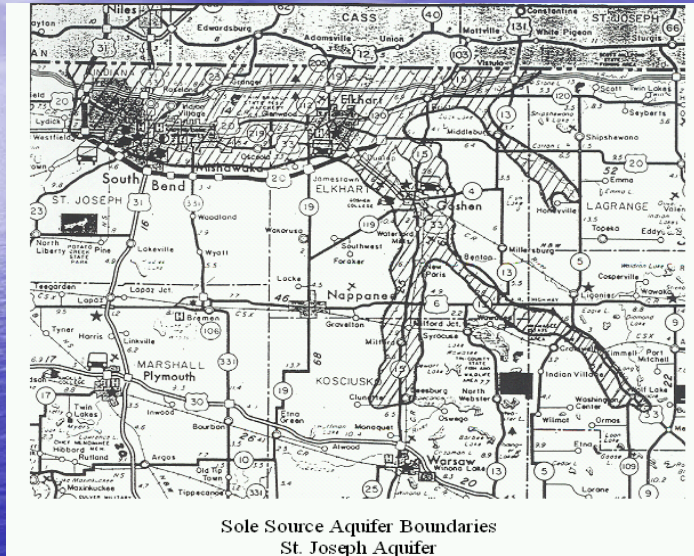
- If impacting a Class V Injection Well
  - Provide EPA basic information -Underground Discharge System (Class V) Inventory Sheet (see Appendix G-1)
  - Do not endanger any underground source of drinking water
  - Only rarely will EPA need additional information – see manual for guidance

## EPA Sole Source Aquifer

- EPA/FHWA developed Memorandum of Understanding (MOU).
- No federal monies will be used for any project EPA determines may contaminate a sole source aquifer.
- Applies to any FHWA funded project that is wholly or partially within sole source aquifer.



## EPA Sole Source Aquifer- St. Joseph Aquifer



## EPA Sole Source Aquifer

- When project occurs in sole source aquifer and meets above criteria, submit *Sole Source Aquifer Screening* form to EPA (usually done in NEPA process)

## IDEM Section 401 Water Quality Certification (WQC)

- Any project requiring a Section 404 USACE permit also requires a \$)! WQC
- 401 WQC comes in two forms
  - For NWPs not requiring a PCN – you are pre-certified and will not have to apply for project specific 401 WQC
  - Project specific 401 WQC

## IDEM Section 401 Water Quality Certification (WQC)

- For Project Specific 401 WQC, form depends upon impacts to waters of state
  - For impacts <0.1 acre and no impacts to isolated wetlands – submit IDEM Section 401 WQC RGP Notification Form #51937
  - For impacts >0.1 acre or impacts to certain types of isolated wetlands – submit IDEM Application for Authorization to Discharge Dredged or Fill Material to Isolated Wetlands and/or Waters of the State Form # 51821

## IDEM Section 401 Water Quality Certification (WQC)

- If a project requires an Section 404 USACE IP and a Section 401 WQC, a combined application is typically submitted to both USACE and IDEM for concurrent review.
- Use IDEM Application for Authorization to Discharge Dredged or Fill Material to Isolated Wetlands and/or Waters of the State Form # 51821

## IDEM Section 401 Water Quality Certification (WQC)

- Following issuance of 401 WQC, USACE will issue Section 404 IP
- Copies of all permits should be included in bid proposal books
- Include all conditions in plans, specifications



## IDEM Rule 5 – Erosion Control

- A Rule 5 submission is required for construction activity where area of grading, excavation, or other land disturbance impacts 1.0 acre or more
  - Any exposed earth counts
  - Formal submission to comply with Rule 5 is not required where >1.0 acre of land is disturbed, but erosion control measures should be applied to all projects

## IDEM Isolated Wetland Permit

- Permitting hinges upon classification of isolated wetlands – Class I, II and III

## IDNR Construction in a Floodway Permit

- Required for any construction in a floodway, including wetlands, where the drainage area is equal to or greater than 50 mi<sup>2</sup> (rural) or 1 mi<sup>2</sup> (urban)

## IDNR Construction in a Floodway Permit - Bridge Exemption

- In order for a bridge to be exempt from obtaining a Construction in a Floodway Permit, the following criteria must be met:
  - Project must be state/county highway department project
  - Project must be a bridge (IDNR considers a culvert to be a bridge)
  - Project must be located in a rural area
  - Project must cross a stream having upstream drainage of less than 50 mi<sup>2</sup>

## IDNR Construction in a Floodway Permit - Bridge Exemption cont'd

All four criteria must be met in order to qualify for the exemption.

This exemption applies only to the Flood Control Act. If a bridge is to be constructed over a navigable waterway or over/near a public freshwater lake, a permit will be required.

## IDNR Navigable Waterways Permit

- Navigable Waterways Act regulates any proposed construction of a permanent structure, place fill, excavate material or withdraw water at a site below ordinary high water mark of a navigable waterways.



## IDNR Navigable Waterways Permit

- This approval is NOT required if authorization has been obtained as a part of the IDNR Certification for Approval for Construction in a Floodway when the Navigable Waterways permit is required. The Navigable Waterways permit is obtained as a part of the IDNR Certification of Approval for Construction in a Floodway
- However exemption from the Construction in a Floodway permit does not necessarily exempt an entity from obtaining a Navigable Waterways permit

## IDNR Dewatering Well Installation

- If a project results in dewatering a well with significant water withdrawal, the following must be done:
  - If temporary – send report to IDNR
  - If permanent - register the well with IDNR – use Record of Water Well Form 35680

## IDNR Water Well Abandonment

- IDNR regulates closure of drinking wells to ensure they are properly sealed and will not become a potential source of groundwater contamination
- No permit is required, but IDNR must be notified in writing within 30 days after plugging is complete.

## IDNR Lake Preservation Act

- IDNR's jurisdiction is at or lakeward of a public freshwater lake's legal or average normal shoreline.
- Typical activities requiring a permit include
  - Dredging
  - Construction of seawalls
  - Refacing of seawalls
  - Permanent piers or fills

## IDNR Lake Preservation Act

- The following water bodies are exempted from requirements of Act
  - Lake Michigan
  - Wolf Lake/Lake George in Hammond
  - Lake Shafer/Freeman (shoreline alteration)
  - Lakes created by or used for surface mining
  - Off-stream, privately-owned water impoundments constructed for pollutant reduction before discharge to public waters
  - Public water supply reservoirs (dredging or shore stabilization within 100 year pool)

## IDNR Lowering of Ten Acre Lakes Act Permit

- This act provides safeguards against the lowering of a freshwater lake's water level as a result of a ditch or drain activity.
- IDNR regulates all ditch and/or drain work within ½ mile of a freshwater lake's shoreline and has a bottom depth below the lake's normal water level. Ditches are regulated regardless of whether they drain to or from the lake, or run alongside it.



## County Regulated Drain Permit

- Each county has its own rules concerning regulated drains.
- Not all counties require approval.
- Purpose of Regulated Drain Permit is to notify a county if a proposed construction project impacts a regulated drain.

## County Regulated Drain Permit

- There are five counties that require permits when a project affects a regulated drain:
  - Allen
  - Elkhart
  - Hamilton
  - Lake
  - LaPorte

# Mitigation

- Impact analysis and mitigation are integral parts of the project development process
- Mitigation for projects is negotiated with the permitting agencies on a case-by-case basis